76-57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-

THE FIRST NATIONAL BANK OF CHICAGO,
Petitioner,

v.

STEVEN GOLDMAN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, The First National Bank of Chicago, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 2, 1976.

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 532 F.2d 10, is unofficially reported in 5 CCH Cons. Cred. Guide ¶ 98,464, and is printed as Appendix A to this petition, *infra.* The opinion of the district court is reported at 392 F.Supp. 214 (N.D. Ill. 1975) and is printed as Appendix B to this petition.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1976. A timely petition for rehearing and suggestions for rehearing *en banc* were denied on April 28, 1976, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970). The case was originally brought in the district court as a civil action arising under the Truth in Lending Act, 15 U.S.C. § 1640 (1970).

QUESTION PRESENTED

Whether a disclosure required to be made by the Truth in Lending Act before the opening of an open end consumer credit account and alleged to be improper is actionable if the complaint is filed more than one year after the account was opened and the disclosure was made.

STATUTORY PROVISIONS INVOLVED†

United States Code, Title 28:

§ 1637(a): "Before opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items . . . ."

§ 1640(e): "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

† 15 U.S.C. §§ 1637 and 1640 (1970 and Supp. IV, 1974) are printed in full in Appendix D to this petition.

STATEMENT OF THE CASE

Petitioner (Bank) seeks review of the court of appeals' decision, Mr. Justice Stevens dissenting, which reversed the district court's holding that respondent's (Goldman) Truth in Lending claim that the Bank had not properly disclosed its method of computing finance charges was barred by the statute of limitations.

On April 3, 1970, Goldman applied to the Bank for a BankAmericard credit card. His application was submitted on a printed form prepared by the Bank. One part of the form was entitled "Disclosure Statement as Required by the Federal Truth-in-Lending Act" and explained how finance charges would be computed if and when incurred. The application was approved on April 16, 1970, and Goldman's credit card was mailed to him in late April or early May, 1970. Along with his credit card, Goldman received a second "Disclosure Statement as Required by the Federal Truth-in-Lending Act," which was identical in all respects to the one contained in his application form.

Goldman first used his credit card on July 1, 1970. That transaction was reflected in a billing statement to him dated September 8, 1970. As required by the Truth in Lending Act and Regulation Z, the billing statement described how finance charges were calculated by the Bank, and that description set forth the same method of calculation as appeared on the two "Disclosure Statements." From September, 1970, through January, 1971, Goldman paid the balance shown on each of his billing statements in full within the specified time and therefore did not incur any finance charges. In the case of his February billing statement, however, Goldman intentionally delayed payment. As a result, he incurred finance charge on his February balance, and the charge appeared on his March, 1971, billing statement.

The complaint was filed on July 8, 1971.

The district court held and no one questions that the initial disclosures required by 15 U.S.C. § 1637(a) and Regulation Z, § 226.7(a), including the method of calculating finance charges, must be made before a credit account is opened. In this case, that meant when Goldman "received and accepted the card from the [Bank] in April or May, 1970, or, at the very latest, on July 1, 1970 when [Goldman] first used the card." 392 F.Supp. at 218. Because the Truth in Lending Act provides that an action under the Act must be brought "within one year from the date of the occurrence of the violation," the district court concluded that Goldman's claim was time barred:

> "Thus, the statute of limitations bars this action since the complaint was filed on July 8, 1971, more than one year after the disclosure was made." *Ibid.*

In reversing, the court of appeals held that "open end" credit plans, such as a credit card plan, are different from "closed end" plans (A. 13-16) and that "it is necessary that there first be a transaction for which a finance charge is imposed for the consumer to evaluate the accuracy of the disclosure." (A. 16). The court then concluded that when open end credit plan disclosures are alleged to be inaccurate

> "the limitations period should not be measured from the date the disclosure was required by law to be made, but instead by the date on which a finance charge was first imposed." (A. 19).

Since finance charge was incurred by Goldman for the first time on March 8, 1971, four months before the complaint was filed, the court of appeals reversed.

Mr. Justice Stevens, sitting as Circuit Justice, dissented:

> "For the reasons ably set forth by Judge Swygert, it might have been wise for Congress to enact a different limitation provision for open end transactions than for closed end transactions. As I read Section 1640(e), however, it imposes the same requirement in cases involving either type of transaction—plaintiff must bring his action under the statute within one year from the date of the occurrence of the violation. Since this plaintiff failed to do so, I am persuaded that he may not avail himself of the remedy created by this statute." (A. 21).

REASONS FOR GRANTING THE WRIT

This case, which arises under the Truth in Lending Act, presents an important question of statutory construction that will have a significant impact on future cases under this public interest statute. In a divided decision reversing the district court, the majority below, invoking policy considerations it perceived, adopted a statutory interpretation that expressly contravenes the language of the statute and drastically expands the scope of cases under the Act. Moreover, the majority's decision directly conflicts with the decisions of two other circuits. In these circumstances, the issue involved deserves plenary consideration by this Court.

1. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Proper Interpretation Of 15 U.S.C. § 1640(e).

Although the majority below tried to distinguish open end credit from closed end credit in order to justify its holding, the statute of limitations makes no such distinction, as Mr. Justice Stevens pointed out in dissent.* The only way that the decision below can be squared with the statute is for the court's decision to be read as a holding that the alleged violation did not occur until finance charge was first imposed or until the borrower knew or should have known of the alleged violation. Either interpretation conflicts with the decisions of other circuits.

In *Wachtel* v. *West,* 476 F.2d 1062 (6th Cir.), *cert. denied,*

* The distinction is clearly recognized elsewhere in the Act. *Compare* 15 U.S.C. § 1637 (1970) *with* 15 U.S.C. § 1639 (1970).

414 U.S. 874 (1973), the complaint was filed seventeen months after the credit agreement was executed. The court of appeals held that the alleged violation occurred when the disclosures were required to be made, which was, at the latest, on the date of the credit agreement. In barring the action, the court rejected the very argument advanced by the court below, *i.e.*, that the alleged violation may "not evidence itself . . . until after the first year." (See Judge Young's dissenting opinion in *Wachtel*, 476 F.2d at 1066.) Likewise, the Sixth Circuit flatly rejected the proposition that "the one year limitation did not commence to run until the plantiffs discovered the defendants' violation." *Id.* at 1067.

Similarly, in *Stevens* v. *Rock Springs Nat'l Bank*, 497 F.2d 307, 310 (10th Cir. 1974), the court of appeals held that an action under § 1640(e) must be brought within one year of the date when the relevant disclosures were required to be made.

No other court of appeals has specifically dealt with § 1640(e),* but decisions in district courts of other circuits are also in conflict. In five other circuits, district courts have held, contrary to the Seventh Circuit, that the statute runs from the date that the challenged disclosure was made or required to be made. *Fenton* v. *Citizens Savings Ass'n*, 400 F.Supp. 874, 878-79 (W.D. Mo. 1975); *Munson* v. *Orrin E. Thompson Homes, Inc.*, 395 F.Supp. 152, 159 (D. Minn. 1974); *Adema* v. *Great Northern Dev. Co.*, 374 F.Supp. 318, 320 (N.D. Ga. 1973); *Chevalier* v. *Baird Savings Ass'n*, 371 F.Supp. 1282, 1284 (E.D. Pa. 1974); *Munn* v. *American Gen. Inv. Corp.*, 364 F.Supp. 110, 113 (S.D. Tex. 1973); *Alpert* v. *U.S. Industries, Inc.*, 59 F.R.D. 491, 498 (C.D. Cal. 1973); *Kristiansen* v. *John Mullins & Sons, Inc.*, 59 F.R.D. 99 (E.D.N.Y. 1973). In the District of Columbia, an interpretation similar to the one adopted by the court below has been followed. *Postow* v. *Oriental Bldg. Ass'n*, 390 F.Supp. 1130, 1137 (D. D.C. 1975).

* In *Sosa* v. *Fite*, 498 F.2d 114 (5th Cir. 1974), the question was not at issue because the borrower sought rescission under 15 U.S.C. § 1635, not the civil penalty of 15 U.S.C. § 1640(a). But the court nonetheless stated that an action under § 1640(a) would have been barred because the complaint was filed more than one year after the date of the transaction which required a disclosure. *Id.* at 121 n.9.

2. The Decision Below Will Adversely Affect The Administration Of Justice Because It Upsets The Carefully Balanced Enforcement Scheme Created By Congress.

In enacting the Truth in Lending Act, Congress obviously sought to encourage private enforcement and for that purpose created two separate private remedies. 15 U.S.C. § 1635 (1970) (rescission); 15 U.S.C. § 1640(a) (1970) (damages, penalty, and attorneys' fees). At the same time, aware that it was enacting a statute of great technical intricacy, Congress balanced the right of a private action with a variety of limitations. These included the exemption of certain transactions from coverage, 15 U.S.C. § 1603 (1970); statutory defenses, 15 U.S.C. § 1640(b), (c) (1970); and specifically relevant to this case, a one-year statute of limitations running "from the occurrence of the violation." 15 U.S.C. § 1640(e) (1970).

A statute of limitations embodies important policy considerations. In *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938), this Court stated:

> "The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after lapse of a reasonable time. It has long been regarded by this Court . . . as a meritorious defense, in itself serving a public interest."

The public interest in the statute of limitations of the Truth in Lending Act is two-fold. First, it is integral to

the balance struck by Congress between the creation of new rights for borrowers and limitations on those rights. Second, as all statutes of limitations do, it plays a role in controlling the swell of litigation in the federal courts.*

Congress surely anticipated that a substantial number of cases would result from the Truth in Lending Act within the confines of the one-year limitation. In any event, it cannot be disputed that a great many timely actions have been brought.** Congress has also remained conscious of the balance it originally struck and, in fact, has amended the provisions related to private remedies from time to time to preserve the balance it deemed desirable.

In October, 1974, Congress reduced the penalty recoverable in a class action to $100,000 in order to quell a rash of suits seeking penalties of "annihilating" proportions. 15 U.S.C. § 1640(a)(2)(B) (Supp. IV, 1974), *as amended by* Pub. L. No. 93-495, § 408(a), 88 Stat. 1518; *see Ratner* v. *Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972); S. Rep. No. 278, 93 Cong., 1st Sess. 14-15

* The importance of the one year limitation of the Truth in Lending Act is underscored by the fact that it is not derived from a general statute of limitations. As part of the very statute that creates the private right of action at issue, it is an absolute prerequisite to the right of action. In *Fenton* v. *Citizens Savings Ass'n*, 400 F.Supp. 874, 879 (W.D. Mo. 1975), where the plaintiff filed his complaint more than three years after the challenged disclosures were required, the court explained:

> "[W]here the time-barring provision is a part of the very statute that creates the cause of action not existing at common law, and *where it is the clear intent of Congress as shown in the statute that the bringing of the action within the time period is a condition of establishing jurisdiction*, the failure to assert the cause of action by bringing suit within that time period results in the District Court not having jurisdiction over the subject matter." (Footnote omitted; emphasis supplied.)

** See generally 5 CCH Cons. Cred. Guide ¶ 98,934 *et seq.*, and CCH Cons. Cred. Guide 1969-73 Transfer Binder.

(1973). Similarly, Congress outlawed attempts to multiply recoveries by alleging multiple violations in connection with a single account, as was allowed in *Thomas* v. *Myers-Dickson Furniture Co.*, 479 F.2d 740, 749 (5th Cir. 1973). 15 U.S.C. § 1640(g) (Supp. IV, 1974) [enacted by Pub. L. No. 93-495, § 407, 88 Stat. 1518]. Other amendments were the addition of a third statutory defense, 15 U.S.C. § 1640(f) (Supp. IV, 1974) [enacted by Pub. L. No. 93-495, § 406, 88 Stat. 1518]; and in March, 1976, the increase of the maximum penalty in § 1640(a)(2)(B) to $500,000. Pub. L. No. 94-240, § 4, 90 Stat. 260. On the other hand, Congress did not see fit to amend the statute of limitations in the light of the decisions in *Wachtel* and *Stevens*.*

The decision below will disturb the careful balance struck by Congress, unduly expanding the institution of private actions in the district courts in the Seventh Circuit and unfairly impinging on lenders' statutory defenses. In the case below, the date on which finance charge was first imposed (the benchmark selected by the majority) was "only" ten months after the account was opened and the challenged disclosures were made. But in an open-end credit plan, the customer need *never* incur finance charges or may not do so for many years. This means that the decision below is not a slight modification of the statute of limitations since it will permit suits to be brought long after the alleged violation occurred. Such delays may make it exceedingly difficult for lenders to establish their statutory defenses because of the

* Congress did amend the rescission remedy of 15 U.S.C. § 1635 (1970) to *add* a statute of limitations. Pub. L. No. 93-495, § 405, 88 Stat. 1517. Previously, there was no specific limitation on suits for rescission. *Littlefield.* v. *Walt Flanagan & Co.*, 498 F.2d 1133, 1136 (10th Cir. 1974). Also, in adding the Equal Credit Opportunity Act to the Truth in Lending Act, 15 U.S.C. § 1691, (Supp. IV, 1974), Congress provided a one year limitation period in language parallel to § 1640(e). 15 U.S.C. § 1691e(g) (Supp. IV, 1974). In so doing, Congress rejected the three year provision proposed originally in H.R. 14856, 93d Cong., 2d Sess. § 7(f) (1974).

loss of supporting evidence and recollection during the intervening years.

It is also a matter of importance that the court below reached the result it did on the basis of what it perceived to be the fundamental policy of the Truth in Lending Act. (See particularly A. 13-15, 19-21). This, however, is an invasion of the legislative prerogative. As Mr. Justice Stevens observed in dissent (A. 21), and as this Court explained in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 377-78 (1973):

> "The statutory scheme is within the power granted to Congress under the Commerce Clause. It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner."

This Court has recently decried the untoward effects on judicial economy and administration that occur when lower courts create or expand federal rights of action beyond the bounds established by Congress. In *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 747-48 (1975), the Court expressed its concern about the "inexorable broadening" of the class of plaintiffs who could sue under § 10(b) of the Securities and Exchange Act of 1934. Later, in *Ernst & Ernst* v. *Hochfelder,* ____ U.S. ____, 96 S.Ct. 1375, 1389 (1976), the Court held that the lower courts should not circumvent the limitations on private rights of action prescribed by Congress in order to achieve what they perceive to be the underlying policy of the statute in question.

The decision below may fairly be described as a first step in the broadening of the private right of action under the Truth in Lending Act. This Court, in the exercise of its supervisory powers and in the interest of preserving the limited character of federal jurisdiction, should review the decision below.

CONCLUSION

For the reasons set forth above, this petition should be granted.

Respectfully submitted,

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July 16, 1976

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 75-1339

STEVEN GOLDMAN, on his own behalf and on behalf of a class consisting of all other First BankAmericard cardholders similarly situated,

Plaintiff-Appellant,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 1653
PRENTICE H. MARSHALL, *Judge.*

ARGUED SEPTEMBER 24, 1975 — DECIDED MARCH 2, 1976

Before STEVENS, *Circuit Justice,** SWYGERT, *Circuit Judge,* and KUNZIG, *Judge.***

SWYGERT, *Circuit Judge.* This appeal presents two questions: whether the trial court's refusal to allow this action under the Truth in Lending Act[1] to proceed as a class action was an abuse of discretion, and whether in plaintiff-appellant Steven Goldman's individual suit before a different judge, the court erred in holding that the

*Mr. Justice John Paul Stevens participated initially as Circuit Judge and on and after December 19, 1975 as Circuit Justice.

** The Honorable Robert L. Kunzig, Judge of the United States Court of Claims, is sitting by designation.

[1] 15 U.S.C. §§ 1601, *et seq.* (1970), as amended, Pub. L. No. 93-495 (October 28, 1974).

statutory limitations period contained in the Act barred Goldman's action.[2]

The limitations question was decided by way of summary judgment for the defendant and against the plaintiff on Counts I, II and III of the amended complaint, each charging violations of the Act, and a dismissal of Counts IV, V and VI, each based on Illinois law and brought pursuant to pendent jurisdiction. The plaintiff Goldman applied to the First National Bank of Chicago for a BankAmericard credit card on April 3, 1970. The application was on a printed form prepared by the Bank. A part of the form was entitled, "Disclosure Statement As Required by the Federal Truth-in-Lending Act."[3] The

[2] 15 U.S.C. § 1640(e) which sets forth the time limitation for filing suits reads:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

There have been two lower court opinions in this case. The class action determination was denied in *Goldman* v. *First National Bank*, 56 F.R.D. 587 (N.D. Ill. 1972). The statute of limitations decision is reported at 392 F.Supp. 214 (N.D. Ill. 1975).

[3] The Bank's "disclosure" reads in part:

> Q. When must I pay a FINANCE CHARGE?
>
> A. The FINANCE CHARGE for Merchandise Purchases is charged to your account on the billing date next following the initial billing of the purchases on the portion of the purchases not reduced by your payments. However, if the entire billed balance for any given month is paid in full, no FINANCE CHARGE for Merchandise Purchases will be imposed. The FINANCE CHARGE for Cash Advances begins on the date the cash advance is made by BankAmericard and continues up to and including the date when payment is received by BankAmericard.
>
> Q. How do you determine the balance upon which a FINANCE CHARGE is imposed . . . ?
>
> A. The balance on which the FINANCE CHARGE is imposed for Cash Advances and for Merchandise Purchases represents the average daily Cash Advance principal and the average daily unpaid Merchandise Purchase principal owing on your account during the billing period. If payments received and credits made during the billing period reduce the previously billed balance to zero, then the FINANCE CHARGE Balance for merchandise purchases will be zero.

application also included the Bank's contract with its cardholders. Among the provisions were the following:

> 3. Customers will be furnished monthly statements for all purchases and borrowings made with Customer's BankAmericard(s). Customers will pay such statements by remitting to the issuer or the Bank through which his BankAmericard is issued within 25 days after billing date.
>
> 4. In respect to credit purchases, the aggregate of all finance charges shall not exceed 1½% per month of the outstanding principal balance per month of the outstanding principal balance owing during the billing period. Finance charges shall commence 25 days from billing date.

The plaintiff's application was approved by the Bank in April of 1970 and his credit card was sent to him shortly thereafter. The plaintiff used his card initially on July 1, 1970 and continued to make purchases during the remainder of the year. Each billing statement included the following information:

> PAYMENT INFORMATION
>
> • • •
>
> 4. . . . "FINANCE CHARGE" at the rate of 1½% per month for "MERCHANDISE PURCHASES" is charged to your account on your next billing date (see stub on reverse side) unless the "NEW BALANCE" on this statement is paid in full within 25 days after your billing date.

The plaintiff paid the balance in full on each billing statement he received from September 1970 through January 1971 within the specified twenty-five day period and thereby did not incur any finance charges; as to the plaintiff's check for his February 8, 1971 billing statement, however, it shows that it was not received until March 9, 1971. Because the payment had not been made within the twenty-five day "free ride" period, a finance charge of $1.19 was imposed by the Bank on its March 8 billing

statement. The plaintiff alleges that this sum represented a finance charge for the period from February 9 to March 8, 1971 at the rate of 1.5 percent per month. Referring to that part of the credit card agreement form which states "finance charges shall commence 25 days from billing date," Goldman states the appropriate finance charge would have been thirteen cents, representing charges for the three days between the end of the twenty-five day period and the March 8 billing date.

The plaintiff brought his suit under the Truth in Lending Act on behalf of himself and a class of BankAmericard credit cardholders similarly situated.

I

We first address the question of the denial of class determination. The district court concluded that Goldman did not meet the requirements of any of the subsections of Rule 23(b) of the Federal Rules of Civil Procedure. That rule requires that the court determine first if the standards for maintenance of a class action are met under Rule 23(a),[4] and, if they are, then the plaintiff, in addition, must demonstrate that:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

[4] Rule 23(a) provides that a class action can be maintained only if:

> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

The district court found that subsections 1, 2 and 3 were satisfied, but failed to reach a conclusion on subsection 4 due to the nature of disposition of Goldman's motion for a determination of class.

> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the finding's include:
>
> > (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
> >
> > (D) the difficulties likely to be encountered in the management of a class action.

The district judge concluded that the action before him did not fall within any of the categories of Rule 23(b) and disallowed the motion for a determination of a class.

Goldman argues that his action properly falls within subsection 3 of Rule 23(b) and that it was an abuse of discretion for the district court not to allow the suit to proceed as a class action. To support his position, the plaintiff relies on *Haynes* v. *Logan Furniture Mart,*

503 F.2d 1161 (7th Cir. 1974), and the recent amendments to the Truth in Lending Act, Pub. L. 93-495, 15 U.S.C. § 1640(a) (Feb. 1975 Supp.).

The district judge prefaced his consideration of the applicability of both subsections 2 and 3 of Rule 23(b) with a discussion of the provision of the Act which, prior to amendment, provided for a minimum statutory amount of recovery of $100 without differentiation between individual and class actions. Goldman had attempted in his amended complaint to disclaim the minimum statutory amount on behalf of himself and all other members of the class. The district judge concluded that a representative plaintiff had no authority to make this disclaimer on behalf of members of his class.[5] The judge went on to consider the superiority of a class action under Rule 23(b)(3). Relying on Judge Frankel's language in *Ratner* v. *Chemical Bank of New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972), the judge determined that a class action in this case would not be superior to other available methods for the fair and efficient adjudication of the controversy. Since it is apparent from the judge's comments that the prospect of a crushing damage award affected his decision in regard to the question of superiority of class procedure, it is important to note initially that the amendment to the Act has obviated the problem of disclaimer in suits of this nature. Public Law 93-495, Title IV (October 28, 1974) § 408 amended the original Act to provide that a creditor failing to comply with the Act was liable:

> (a)(2)(B) in the case of a class action, [for] such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $100,000 or *1* per centum of the net worth of the creditor.

[5] The court found that if plaintiff as an individual waived the statutory minimum he could affect only his individual rights, but would then not have interests in common with the members of the class and could therefore not act as their representative. *Goldman* v. *First National Bank*, 56 F.R.D. 587, 592 n. 4 (E.D. Ill. 1972).

The statute further provides that in determining the amount of award in any class action, "the court should consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional."

Prior to the amendment this court had determined that class actions were not barred in Truth in Lending cases. *Haynes* v. *Logan Furniture Mart*, 503 F.2d 1161 (7th Cir. 1974). Noting that trial courts are usually afforded great latitude in determining the fairest and most efficient methods of adjudication under Rule 23(b)(3), we concluded that the denial of a class determination was an abuse of discretion, predicated as it was on the legal theory that the procedural device of such actions was incompatible with the substantive ends to which the Act is addressed. 503 F.2d at 1163.

We believe the same predilection was evident in the instant case. The district court's consideration of the criteria of superiority in subsection 23(b)(3) in the case now before us "embrace[d] wholeheartedly" the language of *Ratner*. In that case the trial court had accepted the defendant's argument that the incentive benefits inherent in class actions were unnecessary in view of the statutory minimum provided in the Act, and that a recovery of such minimums by an entire class would present a "horrendous, possibly annihilating punishment, unrelated to any damage to the purported class." *Goldman* v. *First National Bank*, 56 F.R.D. 587, 593 (N.D. Ill. 1972). The district court in the instant case also quoted *Ratner's* conclusion that the allowance of class actions in cases such as this was "essentially inconsistent with the specific remedy supplied by Congress."

Since the district court's determination of the question of the appropriateness of the class depended, at least in part, on its acceptance of the idea that class actions are incompatible with Truth in Lending cases, we must

under the rationale of *Haynes* proceed to consider whether a class action is in fact a superior method of adjudicating the present controversy.[6]

We find the decision in *Haynes* does provide guidance. We suggested that although, in Truth in Lending cases, procedural fairness with respect to

> protecting defendants from crushing damages predicated on the statutory minimum recovery is an important consideration in determining the superiority of the class action mode of adjudication, it is at least equally important to prevent violators of the Act from limiting recovery to a few individuals where actual, wide-spread noncompliance is found to exist.
>
> On balance, class actions might very well be superior to individual suits, because while the former would compel correction of disclosure errors and full collection of damages, the latter would result only in correction of errors, for collection damages would be sharply restricted by the short statute of limitations (16 U.S.C. § 1640(e)), the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually. 503 F.2d at 1164-65.

The opinion delineated some of the factors we thought important in evaluating the appropriateness and desirability of class action status. We deemed it "highly significant" that there were actual damages alleged, that in fact a finance charge was imposed and an interest rate applied. In *Ratner,* by contrast, the periodic statement under scrutiny reported "an outstanding principal balance but no interest charge [had] yet accrued." *Ratner,* 54 F.R.D. at 413. In *Haynes* we then noted that

[6] The requirements of section (a) of Rule 23 are satisfied as determined by the district court, *supra,* n. 4. The determination of subsection 4 of Rule 23(a) was not made explicitly in the court's opinion, but we note that Goldman's withdrawal as counsel in the case removed the judge's major objection to his acting as the representative party for the class.

under the statute the individual recovery of twice the finance charge in the transactions for most of the class members would exceed the statutory minimum recovery provided in 15 U.S.C. § 1640. As our prior discussion indicated that we noted this point as a part of our assessment of the unfairness which would result to the defendant by allowing a class action when there was no waiver of the statutory minimums for the members of the class. If their individual recoveries in most cases would have exceeded the minimum amount, it was not unfair to the defendant to allow the suit to proceed as a class action. We then considered the number of prospective class members and found this small (2500) in comparison with *Ratner* (130,000). Our final consideration was that the notice requirements of Rule 23(b)(3) would pose few problems since the consumers were identifiable from the company's installment contract records. *Haynes,* 503 F.2d at 1165.

The introduction of the amendment to the Act in 1974 specifically providing for the waiver of the statutory minimum in class actions has an important bearing on the consideration of the factors enumerated in *Haynes.* Our attention to the amount of finance charges which were imposed in each transaction and our reference to the total number of possible class members are considerations which relate directly to a projection of the amount of recovery and the hardship it would impose on the defendant. With the statutory minimum provision eliminated in class actions and a maximum recovery established under the amendment, these factors, especially as they relate to the number of class members, should be accorded less weight in deciding whether the suit should proceed as a class action. Goldman has in his third amended complaint set forth two alternative measures of damages. He first suggests that the court award to the members of the class twice the amount of finance charges imposed on them. The alternative measure would require the Bank to pay to the class members the amount of undisclosed interest that was charged to them. Fairness to the members of the class is, of course, ensured under the notice requirements of Rule 23(b)(3) which would allow

those who wish to pursue their individual remedy to opt out of the class.[7]

After considering the significant facts in *Haynes,* we conclude that a class action was appropriate under the circumstances of the instant case and that it was an abuse of discretion on the part of the district judge not to allow it to proceed as such. The amendment of the Act which permits the waiver of the stautory minimum and establishes maximum amount of recovery for the class alleviates the hardship which might result if defendants were subjected to class actions involving large numbers of credit cardholders. The members of the class may be identified through the Bank's records. In cases of this nature, where a plaintiff has satisfied the requirements of Rule 23(a) and common questions of law and fact predominate, the final question is whether a class action is superior to other methods of adjudication. We rule that it is in the suit presently before us.

II

The second district court opinion found that Goldman was unable to maintain an individual action because his claim was barred by the limitations provision of the Act, 15 U.S.C. § 1640(e). Goldman filed his complaint more than one year after he had applied for credit from the Bank. The Bank's contention, with which the district judge agreed,[8] is that the statutory language which provides for actions brought "within one year from the date of the occurrence of the violation" bars this suit. The trial judge concluded that:

[7] Goldman's theories of recovery are linked to specific allegations in his complaint (*i.e.*, restitution of the amount of undisclosed interest under an unjust enrichment theory; twice the amount of finance charges under the Acts prohibition against nondisclosure).

[8] Since the district court granted the Bank's motion for summary judgment, and it did not reach the question of whether the forms the Bank used at the time Goldman applied for his credit card in fact violated the standards applicable under the Act, our decision will not reach the merits of the claim, but will only address the statute of limitations question. Both parties have argued the merits, but the trial court is initially the appropriate forum for that resolution.

> the purpose of the statute is to provide full disclosure to the consumer of the cost of using credit to the end that he may more intelligently use it. Disclosure is what Congress intended. Violation of the disclosure provision must occur, if at all, some time before the first transaction occurs. In this case, disclosure occurred when defendant received and accepted the card . . . or, at the very latest, . . . when the plaintiff first used the card. Thus, the statute of limitations bars this action since the complaint was filed . . . more than one year after the disclosure was made.[9]

The application for the card was made on April 3, 1970, it was issued about a month later, and the first transaction by Goldman using the card occurred on July 1, 1970. The Bank argues that one of these dates is the appropriate one to use for measuring the statutory year. Since the complaint was not filed until July 8, 1971, the use of any of these dates would bar the claim.

Goldman argues that the court should consider the nature of the credit plan under review when applying the statutory limitations period. His argument casts the question before us in novel terms. He emphasizes that his case concerns an "open end credit plan" whereas all but one of the reported cases under the Act to date have dealt with "close end credit transactions."[10] Goldman offers four

[9] *Goldman* v. *First National Bank,* 392 F.Supp. 214 (N.D. Ill. 1975).

[10] The one reported case which involved an open end credit plan is *White* v. *Central Charge Service, Inc.,* CCH Consumer Credit Guide ¶ 9.170, at 89,063 [1969-73 Transfer Binder]. In that case the plaintiff alleged a violation of section 1637(b)(2) of the Act which requires a description of the goods purchased to be included on the periodic billing statement sent to the customer. The *White* court found that since prior to the receipt of the billing statement the consumer could not be aware of its content and thus that a violation of the Act had occurred, the statute ran from the date the statement was received. The *White* case is of no assistance in analyzing the instant action. The requirements in regard to periodic billing statements represent independent violations of the Act. The violation alleged in *White* was in such a billing statement and not in the disclosure statement. *White,* therefore, is analogous to an omission in a disclosure statement, not to a situation where there has been a false, incomplete or misleading disclosure as Goldman alleges in the instant case.

theories in support of his conclusion that open end credit plans should be treated differently in regard to the limitations question.[11] The theories fall into two categories. The logic of the first category is that a false or misleading disclosure is the equivalent of no disclosure, but that such misstatement is impossible to discover until a finance charge has been levied; there is, in other words, no action taken by the lender inconsistent with the false or misleading statement until such a charge is imposed and thus the relevant date for the limitations period should be the date on which the charge was first assessed. That is the date on which a debtor may be expected to first discover that a violation has occurred. If no disclosure was made, of course, the debtor would be cognizant of that fact on the day the credit disclosure forms were given to him, but, Goldman argues that when there has been inaccurate, partial or misleading disclosure, there is no way, prior to the billing of an inconsistent finance charge, for the violation to be ascertained and action taken. Goldman concludes that using the date of the imposition of the first finance charge as the triggering date in open end credit transactions where there has been a disclosure which appears on its face to comply with the Act would be consistent with the purposes of the Act.[12]

[11] An open end credit plan is one in which credit terms are initially established with the opening of the account, but no fixed amount of debt is incurred at that time. Purchases made from time to time are added to the outstanding balance in the account and each new purchase represents an additional extension of credit under the terms as originally defined in the credit agreement. As the Act defines it in section 1602(i):

> The term "open end credit plan" refers to a plan prescribing the terms of credit transactions which may be made thereunder from time to time and under the terms of which a finance charge may be computed on the outstanding unpaid balance from time to time thereunder.

[12] Goldman asserts that the Bank fraudulently concealed the real nature of its interest charges, or that no cause of action occurred until a finance charge was imposed, or that there was no notice to the borrower that a violation had occurred until a charge was actually imposed. Under the first theory, the time period would not run until the borrower knew or should have known of the violation. Under the latter two theories, the time would be measured from the time the finance charge was first imposed. All three theories would allow the action to continue.

Goldman's second category is that of "continuing violations." Under this approach, he argues that the limitations period did not begin to run until the Bank had fulfilled its statutory duty to disclose according to the standards imposed by the Truth in Lending Act. Adoption of this theory by the court would also allow Goldman's action to proceed.

Before beginning our analysis, we note that the violation defined in the Act is that of *not disclosing* the method the creditor will use when computing finance charges. The intent of Congress in enacting the legislation is set forth in 15 U.S.C. § 1601 which states:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

The Act does not condemn in specific terms the situation where there has been a false or misleading disclosure. This type of behavior is, however, encompassed within the legislation, the intent of which is to "assure a meaningful disclosure of credit terms."

In practical terms, under an open end credit plan, there in no extension of credit simply by the issuance of the card.[13] An agreement has been reached between a poten-

[13] The definition of the term "open end credit" set forth, *supra*, at n. 9, supports this conclusion as does section 1337(b) which mandates the required disclosures for periodic billing statements in open end accounts. That section provides that the periodic statement include:

> (2) The amount and date of each extension of credit during the period.

The individual transactions completed through the use of the card should then be considered as discret extensions of credit.

tial borrower and a lender who defines the conditions and terms under which its credit service may be used. Until the consumer negotiates a transaction using the credit card there has been no extension of credit—no debt has accrued and the creditor's funds have not been transferred to the use of the borrower.

This type of credit plan differs from the close end plans not only because no credit has been extended at the time of the agreement, but also because no set amount of debt has been incurred. Open end credit plans may impose ceilings or debt limits on their customers' line of credit, but as payments are made, the lines are cleared and the gross total of the transactions may well exceed the ceiling amount so long as payments keep the net balance at any one time below the credit limit.

It is apparent from the legislative history that Congress had some difficulty dealing with the problems that the open end type of credit arrangement represented in terms of the Act's purpose of ensuring disclosure so as to allow consumers to make intelligent credit decisions. Open end credit plans were singled out for "special treatment" in the House Report accompanying the bill. The bill had been amended so that this type of credit plan was exempted from the requirement of disclosure of annual percentage rates for finance charges. The House Committee believed that the use of periodic rates (most commonly, the percentage imposed on a monthly basis) was appropriate in spite of significant opposition to that method of accounting.[14] The opposition urged the use of an approximate

[14] Representative Patman and ten other Congressmen, issued a *Supplemental View* which set forth their displeasure with the committee's amendment to the proposed bill which permitted certain open end creditors to express their charges to consumers in periodic percentage rate basis rather than on an annual basis. The amendment was attributed to the reasoning "vigorously" offered by spokesmen for the largest retailers in the country that a charge of one and one-half percent a month assessed on a customer's unpaid balance does not in fact represent a rate of eighteen percent a year because typically the customer pays off the balance long before the year elapses by making payments on his account, and often he is liable for no service charge whatsoever because the use of a "free ride" period in most accounts of this type means that, if the balance in the account is paid in full before a certain date, there is no charge to the customer for financing. U.S. Code and Administrative News, 90th Cong., 2d Sess., 1968, p. 1192. The retailers had argued that if an annual rate were to be required for the open end form of credit, it should be determined retroactively, at the end of a year, and "based on the number of days the customer enjoyed free credit as well as the total credit charges he paid."

annual rate even though "the yield to the creditor may be more or less than the nominal annual rate [because] disclosure . . . is necessary to assist the consumer in 'comparison shopping' for credit under an [open end] account, as opposed to other forms of credit transactions."[15] To mitigate against this competitive advantage and to provide additional protection for open end consumers, the Committee bill provided that if a customer requested, he would receive an approximate annual percentage rate figure for his account. The Act also required that open end credit plans under 15 U.S.C. § 1637(b) include in their periodic billing statements certain information relating to the credit transactions which had taken place.

An examination of the distinctive qualities of open end credit plans and the problems they present is necessary for an understanding of Goldman's assertion that the statutory limitations period should not run against him until there has been a finance charge imposed which would put him on notice that a violation had occurred. Goldman's observation that when the disclosure statement is false, incomplete or inaccurate, it is not until the imposition of the first finance charge that the debtor can perceive that a violation has occurred is irrefutable. In close end transactions the finance charge is divided into the term of the loan and incorporated into the time payments and thus the rate is computable by the consumer from the time he receives his first billing. With an open end plan, however, especially those like the one at issue which includes a "free

[15] House Report No. 1040 U.S. Code and Administrative News, 90th Cong., 2d Sess., 1968, p. 1971.

ride" period, it is necessary that there first be a transaction for which a finance charge is imposed in order for the consumer to evaluate the accuracy of the disclosure. It may, therefore, be months before a violation is perceived.[16]

The cases under the Act which have considered the statutory limitations period have done so in the context of close end credit plans. *Wachtel* v. *West,* 476 F.2d 1062 (6th Cir. 1973), a decision heavily relied upon by the Bank here, addressed the narrow question presented on appeal—whether the violations of the duty to disclose information occurred at the time it was first required to be made, or whether there were a series of continuing violations until such time as disclosure was actually made. The Sixth Circuit examined the purposes of the Act and the regulations that had been promulgated pursuant to its authority. The court concluded that in order to allow the consumer to make a "meaningful" credit decision, as was the legislation's purpose, it was necessary that he have the required information in his possession before he became committed to any particular lender. The court found this conclusion supported by section 1639(b) of the Act which directs that the disclosures required in section 1639(a) (loan transactions) be made "before credit is extended."[17] The Act provides no definition of when credit is deemed extended and the court looked to Regulation Z which defined the time at which a transaction be considered "consummated." This period is set as the time at which a contractual relationship is created between a creditor and a customer, irrespective of the time of performance of either party. The court in *Wachtel* then concluded that a credit transaction which required disclosure under the Act was completed when the lender and borrower

[16] That was the situation in this case. Goldman made a number of purchases with the card prior to the one which precipitated this suit, but since he paid the balance of the account during the "free ride" period, no finance charge was levied. There was not, therefore, any action by the Bank inconsistent with the disclosure statement prior to the imposition of the first finance charge.

[17] Section 1638 which sets forth the required disclosures for *sales* not under open end credit plans has an analogous provision.

contracted for the extension of credit and that in order for there to be no violation the disclosures must be made before that time. If, however, the disclosures were not made, the court concluded that the violation occurred at the very latest at the time at which the parties performed their contract.

Subsequent cases have not uniformly followed the reasoning of *Wachtel* when confronted with the theory of continuing violations under the Act, but they have generally agreed that there is a certain specific time at which a violation of the disclosure requirement occurred and from which the limitations period will then run. *Stevens* v. *Rock Springs National Bank,* 497 F.2d 307 (10th Cir. 1974); *Kristiansen* v. *Mullins and Sons, Inc.,* 59 F.R.D. 99 (E.D.N.Y. 1973). *Cf. Postow* v. *Oriental Building Association,* 390 F. Supp. 1130 (D.C. 1975).

There are several distinctions between the transactions involved in the *Wachtel* line of cases and those in the instant case. *Wachtel* was concerned with disclosures required in close end transactions under section 1639(a) of the Act. Here we are examining an open end plan which is governed by section 1637 which does not contain a provision analogous to section 1639 which sets forth the "Form and Timing of Disclosure" applicable to the requirements defined in another subsection. Section 1637, by contrast, prefaces its list of required disclosures with the admonition that: "[*b*]*efore opening any account* under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items" (emphasis added). Under the process employed by the *Wachtel* court then, when considering a section 1637 transaction, it would not be necessary to refer to Regulation Z for a definition of the statutorily designated time at which the duty to disclose arose. The statute is clear that the duty is imposed under section 1637 before the opening of the account. If Regulation Z is consulted, however, section 226.7 designates as the relevant disclosure time that period: "[*b*]*efore the first transaction* is made on any open end credit account" (emphasis added). If, then, there is a vio-

lation of the Act in an open end credit plan, it occurs at the time the account is opened, or at the very latest, some time before the first transaction takes place. Goldman's argument that there has not been a completed "transaction" through which a violation could occur until a finance charge is imposed, therefore, is incorrect. We also reject his argument that the situation here presented is one in which there are continuous violations—that the duty to disclose mandates that until disclosure is made as required by the Act, a violation continues and thus the statute is tolled. This argument we believe is also precluded by the language of the statute.

Our conclusions arrived at thus far do not, however, resolve the issue. An additional distinction between *Wachtel* and the case here is more significant. The earlier cases were ones in which there had been no disclosure and, thus, the violation was immediately apparent. Goldman's argument that false, misleading or inaccurate disclosures be treated differently than the situation where no disclosure has been made for the purpose of measuring the limitations period is relevant to an evaluation of when a cause of action accrued for purposes of computing the limitations period. Goldman asserts that the doctrine of fraudulent concealment operates in this case to suspend the application of the limitations period. This argument has two dimensions: that the concealment was "active" in that the Bank intentionally concealed the method of determining the balance upon which it would compute the finance charge in view of the "free ride" period; or, that even if there was no attempt on the part of the Bank to actively conceal the misrepresentation, the statute of limitations should not begin to run until the consumer had an opportunity to perceive that a violation had occurred. The focus of the latter argument is on the lack of opportunity on the part of a consumer to discover that a wrong had occurred. In addition, Goldman argues that the purpose of the Act is furthered by accepting his approach to the limitations period and that the district court's harsh construction of that provision frustrates the intent of Congress to protect consumers from "the uninformed use of credit."

It is not necessary to consider Goldman's contentions on the fraudulent concealment theories. We are persuaded that when, as here, there has been an incomplete, inaccurate or misleading disclosure, the limitations period should not be measured from the date the disclosure was required by law to be made, but instead by the date on which a finance charge was first imposed. In addition to the stated legislative intent in the Act and the unique but somewhat problematic nature of open end credit arrangements (already discussed in this opinion), there are other considerations which compel the result we reach.

One consideration is the importance of the imposition of a finance charge to the legislative scheme. Prior to amendment, 15 U.S.C. § 1640(e) provided that the creditor's liability would be twice the amount of finance charge imposed in connection with the transaction. The 1974 amendment did not change this measure for individual actions, but added the provision for measurement of damages in class actions. The finance charge is the measure of damages imposed by the statute—the central consideration. Actions have been allowed and liability found when there has been no finance charge imposed,[18] but the imposition of a finance charge was clearly contemplated as the event which would usually give rise to a suit under the Act. The fact that it is not the *only* event which may precipitate an action is immaterial. The imposition of a finance charge under an open end credit plan in which an inaccurate disclosure has been made is a necessary condition for the assessment of liability since it is this charge against which the accuracy of the disclosure must be measured. The Act

[18] *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973), where the Court found a rule valid in spite of the fact that the Act mentioned disclosure only in those cases in which a finance charge was imposed while the rule promulgated by the Federal Reserve Board encompassed situations in which no such charge was levied. The Court reasoned that Congress did not attempt to specify all situations in which the Act would apply and that the deterrent effect of the rule which reached transactions in which finance charges were concealed in the selling price clearly implemented the objectives of the Act.

focuses on the finance charge, designating it in most cases as the measurement for damages. The "informed use of credit" which the Act seeks to ensure is not possible if the cost of financing is hidden. In close end plans a determination of the charges is possible from the time of the first payment. In open end plans with "free ride" periods, a finance charge may not appear until after many payments have been made. Until a finance charge is levied the debtor has no cause for complaint since there has been no action inconsistent with the inaccurate disclosure.

We also find it significant that the Act mandates the disclosure of the information here in question only at the time of the opening of the account. Goldman's complaint is that the statement was inaccurate in describing the date on which finance charges commenced. This information required by subsection (a) of 15 U.S.C. § 1637, which provides that before the account is opened the creditor disclose "the method of determining the amount of the finance charge," does not have a counterpart in subsection (b) which delineates the disclosures which must be made with each billing cycle. A consumer may not then resort to an action based on the disclosure required in the billing statement as the ground for his action once the limitations period has run for a claim under subsection (a). If he is to be given any relief, it must result from the creditor's violation of subsection (a).

We think our decision here is consistent with those cases which designate as the time from which a statute of limitations begin to run the date at which the last significant event necessary to make the claim suable occurs. *United States* v. *Wurts,* 303 U.S. 414 (1938); *Mack Trucks, Inc.* v. *Bendix-Westinghouse Automotive Air Brake Co.,* 372 F.2d 18 (3d Cir.), *cert. denied,* 387 U.S. 930 (1967). In view of the fact that a disclosure had been made, that the open end plan in question contained a free ride provision which if the consumer was prompt with his payments allowed a significant amount of time to pass before any finance charge was imposed, and the fact that Congress clearly sought to compel accurate disclosure, the purposes of the Act are

best served by allowing this action to proceed, unbarred by the limitations period. We note that this holding by its own terms is limited to the unique and narrow set of circumstances presented in open end credit plans.

The judgment of dismissal is reversed and the case is remanded for a determination of class members and a trial on the substantive issues.

Mr. Justice Stevens, dissenting.

For the reasons ably set forth by Judge Swygert, it might have been wise for Congress to enact a different limitation provision for open end transactions than for closed end transactions. As I read Section 1640(e), however, it imposes the same requirement in cases involving either type of transaction—plaintiff must bring his action under the statute within one year from the date of the occurrence of the violation. Since this plaintiff failed to do so, I am persuaded that he may not avail himself of the remedy created by this statute.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN GOLDMAN, et al., *Plaintiff,* v. FIRST NATIONAL BANK OF CHICAGO, *Defendant*	No. 71 C 1653

MEMORANDUM OPINION

Before me are defendant's motion to strike and dismiss and plaintiff's motion for summary judgment as to Counts 1-3 of the complaint. The material facts are undisputed. Based on the facts, the judgment of the court is that summary judgment should be granted for the defendant.

The plaintiff's third amended complaint is in six counts. Counts 1-3 alleged violations of sections 121(a), 127(a) and 130(a), of the Truth in Lending Act,[1] 15 U.S.C. §§ 1631(a), 1637(a), and 1640(a)(1970). The remaining counts allege violations of the Illinois Consumer Fraud Act, Ill. Rev. Stat., ch. 121-1/2, § 262 (1973), and the Illinois Deceptive Trade Practice Act, Ill. Rev. Stat., ch. 12-1/2 § 312(12) (1973). The substance of the controversy lies in the disclosures made by the defendant in its BANKAMERICARD

[1] The Truth in Lending Act is Title I, 15 U.S.C. § 1601 et seq. (1970), of the Consumer Credit Protection Act, amended P.L. No. 93-495 (October 28, 1974).

open end credit plan.[2] Jurisdiction of Counts 1-3 rests on 15 U.S.C. § 1640(e) and is pendent as to Counts 4-6.

Under the BANKAMERICARD AGREEMENT a cardholder may make merchandise purchases and borrow money with his card. At the end of a billing period a cardholder receives a statement itemizing the previous balance, all current charges and credits to the account, finance charges, if any, and the new balance, including finance charges.

A finance charge of 1½ percent per month is applied on the outstanding average daily balance due on the account during the billing period. If the entire balance for merchandise purchases is paid and received within 25 days of the billing date shown on the billing statement, no finance charge is imposed. On the other hand, if full payment is not received within 25 days, a finance charge accruing from the billing date is imposed on the unpaid balance at the rate described above. The BANKAMERICARD AGREEMENT states that "Finance charges shall commence 25 days from the billing date." Whether this provision is consistent with the method actually used to determine finance charges is the center of the controversy.

Plaintiff used his BANKAMERICARD several times in the seven or eight months following his receipt of it. But he always paid the balance due within 25 days of billing date and thus incurred no finance charge. The plaintiff's February 8, 1971, bill carried new purchases of $79.04. To avoid incurring finance charges, this amount had to be paid in full by March 5, 1971. No payment was received by this

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[2] "The term 'open end credit plan' plan refers to a plan prescribing the terms of credit transactions which may be made thereunder from time to time and under terms of which a finance charge may be computed on the outstanding unpaid balance from time to time thereunder." 15 U.S.C. § 1602(i) (1970); *see* 12 C.F.R. § 226.2(r) (1974).

date; as a result, the March 8 statement reflected a finance charge of $1.19, which accrued retroactively to the February 8, 1971, billing date. Thus, the plaintiff argues that the charge did not commence 25 days after the billing date, and hence the disclosure requirements of the Truth in Lending Act were violated.

The clear purpose of the Truth in Lending Act is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601 (1970). Thus the Act assures that the cost of credit will be disclosed and that other credit terms will be disclosed so that consumers can compare various plans and make an informed decision on the use of credit. 12 C.F.R. §226.1(a)(2) (1974). *See* S. Rep. No. 392, 90th Cong., 1st Sess. (1967); H.R. Re. No. 1040, 90th Cong. 1st Sess. 7, 13 (1967); 2 U.S. Cong. & Adm. News 1962 (1968).

The Act, as interpreted by Regulation Z of the federal reserve system, 12 C.F.R. § 226, *et seq.* (1974), requires that before the first transaction is made on an open end plan, the creditor, in a single statement, must clearly, conspicuously and in meaningful sequence, disclose to the prospective obligor the conditions under which a finance charge may be imposed, an explanation of any free ride period, the method of determining the finance charges, the periodic rate, and corresponding annual percentage rate. 15 U.S.C. §§ 1631, 1637 (1970); 12 C.F.R. §§ 226.6(a), 226.7(a) (1974). In essence, the plaintiff's complaint charges that the free ride period was not disclosed clearly and conspicuously.

The plaintiff strenuously urges that the disclosures made by the defendant did not meet the broad objectives of the remedial Truth in Lending Act. For its part, the defendant

asserts with equal vigor that the disclosure was adequate, and that the method of calculating the finance charge was the fairest method used in the industry and consistent with banking custom.[3] The question of whether the disclosure was adequate need not be decided, however, because the plaintiff's claim under the Act is barred by the applicable statute of limitations.

Section 130(e), 15 U.S.C. § 1640(e) (1970), of the Act provides:

> Any action under this section may be brought in any United States District Court or in any court of competent jurisdiction, within one year from the date of the occurrence of the violation.

The facts surrounding the statute of limitations defense are not in dispute. In April of 1970, the plaintiff applied for a BANKAMERICARD on a standard form supplied by the defendant. In late April or early May he received the card along with the BANKAMERICARD AGREEMENT and a *Disclosure Statement as Required By the Truth In Lending Act.* For purposes of this action, the disclosures were made when the plaintiff received these written statements along with his card.[4] On July 1, 1970, the plaintiff first used the card. The first finance charge was imposed on March 8, 1971, and the complaint was filed 4 months later on July 8, 1971. On these facts there are three possible times from which the statute could run. The defendant urges

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[3] Affidavit of John T. Borman, filed Nov. 12, 1973.

[4] The Act requires that all mandated disclosures be made in a single written statement which may be retained by the consumer. 12 C.F.R. § 226.6(a) (1974). On the *Disclosure Statement* part of the application was capable of retention. The BANKAMERICARD AGREEMENT is on the reverse side of the application that was sent to the defendant. A second *Disclosure Statement* and BANKAMERICARD AGREEMENT did, however, accompany the credit card. These are capable of retention. *See* 12 C.F.R. § 226.7(a) (1974).

that it runs from the date of disclosure or at the latest the date the card was first used. Under either of these interpretations, the statute would bar this action. The plaintiff asserts the third alternative; the statute runs from the date the first finance charge was imposed, March 8, 1971. If this is correct, the complaint was filed within the one-year period.

Of the few reported cases dealing with the statute of limitations under the Act, not one has faced the precise issue presented by this action. In *Wachtel* v. *West,* 476 F.2d 1062 (6th Cir.) *cert. denied,* 414 U.S. 874 (1973), the plaintiffs alleged that they had borrowed money from the defendants on October 28, 1970, giving a second mortgage on their residence. The complaint was filed on April 25, 1972, more than a year after the loan was made. On these facts the lower court dismissed the action on the merits (344 F. Supp. 680 (E.D. Tenn. 1972)). The court of appeals affirmed the lower court and held that a

> credit transaction which requires disclosures under the Act is completed when the lender and borrower contract for the extension of credit. The disclosures must be made sometime before this event occurs. If the disclosures are not made, this violation of the Act occurs, at the latest, when the parties perform their contract. 476 F.2d at 1065.

Thus, the court rejected any notion that violations under the Act were continuing when damages were sought.

Wachtel is distinguishable from the present action because it was not an open end credit arrangement. Only a single credit transaction was contemplated: a loan secured by a second mortgage on the plaintiffs' residence. Moreover, the challenged disclosure and the performance of the contract both took place on the same day.

A more recent decision, *Stevens* v. *Rock Springs National Bank,* 497 F.2d 307 (10th Cir. 1974), considered a similar problem and the interpretation of section 1640(e) utilized in *Wachtel.* Stevens alleged that he purchased a mobile home in July, 1971, executing a purchasing agreement, a promissory note, and a security agreement in favor of the defendant. The second plaintiff, Hinkle, signed a purchase agreement for a mobile home on April 4, 1972, but did not execute a promissory note and security agreement in favor of the defendant until approximately April 18. The two complaints were filed on April 13, 1973.

The defendants argued that both claims were barred by the one year statute of limitations, while the plaintiffs argued that the duty of disclosures was continuing and therefore the statute had not run on either claim. Rejecting plaintiffs' argument, the court agreed generally with the language of *Wachtel*:

> While in this opinion we do not necessarily adopt the Sixth Circuit's reference to the date of "performance" as the date on which a violation occurs, we nevertheless agree generally with the proposition that violation of the disclosure requirements . . . occurs at a specific time from which the statute will then run. Thus, it does not necessarily become a continuing failure or breach. 497 F.2d at 309.

The court went on to hold that the statute had run on Stevens because the credit contract had been executed and credit extended more than one year before the complaint was filed. Hinkle's claim was not barred, however, because he did not become bound on the credit agreement until April 17, 1972, the date he signed the note and security agreement.

Like *Wachtel,* the transactions in *Stevens* concerned consumer loans not under an open end credit plan. The decision, therefore, is not controlling in an action under an open end

plan. Nevertheless, the court's interpretation of the limitations period does hold that violations are not continuing and that the violation occurs when the credit contract is executed.

The only reported case discussing the statute of limitations and open end credit transactions is *White* v. *Central Charge Service, Inc.,* [1969-1973 Transfer Binder] *CCH Cons. Credit Guide,* ¶ 99,170, at 89,063 (D.C. Super. Ct. 1972). The plaintiff alleged a violation of section 1637(b)(2) of the Act, which requires a brief description in a periodic billing statement of the goods purchased. The court held that the statute ran from the date the billing was received, because prior to that time the consumer would not be aware of the statement's content.

Both parties maintain that *White* supports their position. A close analysis of the decision, however, reveals that it differs substantially from the facts of the instance action. The disclosure violation was alleged in the billing statement, and not in the disclosure statement. The inadequate billing statement was the actionable violation. Obviously a statement cannot be inadequate until it is made. In the instant case, however, the plaintiff contends the imposition of finance charges over a year after he received the allegedly defective disclosure statement is the actionable violation and the point from which the statute runs.

The plaintiff's complaint alleges, in three counts, violations of the Act. Each of the counts alleges violations of section 1631(a) and 1637(a) of the Act. Section 1631(a) requires that each creditor disclose clearly and conspicuously in accordance with the Board's regulations, the information required by the Act. Section 1637 details the required disclosure under open end credit plans.

> (a) Before opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following terms, to the extent applicable:
>
> > (1) The conditions under which a finance charge may be imposed, including the time period, if any, within which any credit extended may be repaid without incurring a finance charge.

The statute thus requires disclosure to be made *before* an account is opened. Regulation Z, 12 C.F.R. § 226.7(a)(1) (1974), amplifies this requirement.

> Before the first transaction is made in any open end credit account, the creditor shall disclose in a single written statement, which the customer may retain . . . each of the following items, to the extent applicable:
>
> > (1) The conditions under which a finance charge may be imposed, including an explanation of the time period, if any, within which any credit extended may be paid without incurring a finance charge.

Again the stress is on disclosure *before* the first transaction is made in an open end account. The statute of limitations, 15 U.S.C. § 1640(e), provides that an action may be brought "within one year from the date of the occurrence of the violation."

On the basis of the statutes cited and the previously discussed case law, it is clear that the statute runs from the date of disclosure and not the date the finance charge is imposed. As previously discussed, the purpose of the statute is to provide full disclosure to the consumer of the cost of using credit to the end that he may more intelligently use it. Disclosure is what Congress intended. Violation of the disclosure provision must occur, if at all, sometime before the first transaction occurs. In this case, disclosure occurred when defendant received and accepted the card from the defendant in April or May, 1970, or, at the very latest, on

July 1, 1970 when plaintiff first used the card. Thus, the statute of limitations bars this action since the complaint was filed July 8, 1971, more than one year after the disclosure was made.

To the extent that the previously cited cases dealing with section 1640(e) are applicable to this case, the result reached here is in accord. By holding that the statute runs from the time of disclosure, the continuing failure theory is rejected. Moreover, the result is consistent with *Stevens* in holding that the statute runs from the time the contract is executed.

Plaintiff contends that the statute must run from the date the finance charge is imposed because otherwise no damages would be recoverable under the Act, section 1640(a), amended Pub. L. No. 93-495, § 408 (October 28, 1974). Under the former version of section 1640(e), a civil penalty could be imposed although no finance charge was imposed. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 376 (1973). The amended version, which is applicable to this case, Pub. L. No. 93-495, § 408(e) (October 28, 1974), does not change this result.

Accordingly, for the foregoing reasons, summary judgment is Granted for defendant and against plaintiff on Count 1 through 3. Because of this disposition, defendant's motion to dismiss the pendent counts 4 through 6, also is Granted, and plaintiff's motion for reconsideration of denial of class certification is moot. Thereupon, It Is Ordered and Adjudged that the plaintiff's action be Dismissed and that defendant have judgment for its costs.

ENTER:

Judge Prentice H. Marshall

DATED: February 5, 1975.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 28, 1976

Before

Hon. JOHN PAUL STEVENS, Circuit Justice*

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. ROBERT L. KUNZIG, Judge**

STEVEN GOLDMAN, on his own behalf and on behalf of a Class consisting of all other FIRST BANK AMERICARD cardholders similarly situated, Plaintiff-Appellant, No. 75-1339 vs. THE FIRST NATIONAL BANK OF CHICAGO, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Divsn. (71 C 1653)

On consideration of the petition for rehearing and suggestion that it be reheard *in banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled cause be, and the same is hereby, DENIED.

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* Mr. Justice Stevens participated initially as Circuit Judge, and on and after December 19, 1975 as Circuit Justice.

** Judge Robert L. Kunzig of the United States Court of Claims is sitting by designation.

APPENDIX D

15 U.S.C. § 1637. Open end consumer credit plans.

(a) Required disclosures by creditor.

Before opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items, to the extent applicable:

(1) The conditions under which a finance charge may be imposed, including the time period (if any) within which any credit extended may be repaid without incurring a finance charge, except that the creditor may, at his election and without disclosure, impose no such finance charge if payment is received after the termination of such time period.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) If the creditor so elects,

(A) the average effective annual percentage rate of return received from accounts under the plan for a representative period of time; or

(B) whenever circumstances are such that the computation of a rate under subparagraph (A) would not be feasible or practical, or would be misleading or meaningless, a projected rate of return to be received from accounts under the plan.

The Board shall prescribe regulations, consistent with commonly accepted standards for accounting or statistical procedures, to carry out the purposes of this paragraph.

(6) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(7) The conditions under which the creditor may retain or acquire any security interest in any property to secure the payment of any credit extended under the plan, and a description of the interest or interests which may be so retained or acquired.

(8) A statement, in a form prescribed by regulations of the Board of the protection provided by sections 1666 and 1666i of this title to an obligor and the creditor's responsibilities under sections 1666a and 1666i of this title. With respect to each of two billing cycles per year, at semiannual intervals, the creditor shall transmit such statement to each obligor to whom the creditor is required to transmit a statement pursuant to subsection (b) of this section for such billing cycle.

(b) Statement required with each billing cycle.

The creditor of any account under an open end consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items to the extent applicable:

(1) The outstanding balance in the account at the beginning of the statement period.

(2) The amount and date of each extension of credit during the period and a brief identification on or accompanying the statement of each extension of credit in a form prescribed by regulations of the Board sufficient to enable the obligor to identify the transaction, or relate it to copies of sales vouchers or similar instruments previously furnished.

(3) The total amount credited to the account during the period.

(4) The amount of any finance charge added to the account during the period, itemized to show the amounts, if any, due to the application of percentage rates and the amount, if any, imposed as a minimum or fixed charge.

(5) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and, unless the annual percentage rate (determined under section 1606(a)(2) of this title) is required to be disclosed pursuant to paragraph (6), the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(6) Where the total finance charge exceeds 50 cents for a monthly or longer billing cycle, or the pro rata part of 50 cents for a billing cycle shorter than monthly, the total finance charge expressed as an annual percentage rate (determined under section 1606(a)(2) of this title), except that if the finance charge is the sum of two or more products of a rate times a portion of the balance, the creditor may, in lieu of disclosing a single rate for the total charge, disclose each such rate expressed as an annual percentage rate, and the part of the balance to which it is applicable.

(7) At the election of the creditor, the average effective annual percentage rate of return (or the projected rate) under the plan as prescribed in subsection (a)(5) of this section.

(8) The balance on which the finance charge was computed and a statement of how the balance was determined. If the balance is determined without first deducting all credits during the period, that fact and the amount of such payments shall also be disclosed.

(9) The outstanding balance in the account at the end of the period.

(10) The date by which or the period (if any) within which, payment must be made to avoid additional

finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

(11) The address to be used by the creditor for the purpose of receiving billing inquiries from the obligor.

(c) Time for making required disclosures.

In the case of any existing account under an open end consumer credit plan having an outstanding balance of more than $1 at or after the close of the creditor's first full billing cycle under the plan after the effective date of subsection (a) of this section or any amendments thereto, the items described in subsection (a) of this section, to the extent applicable and not previously disclosed, shall be disclosed in a notice mailed or delivered to the obligor not later than the time of mailing the next statement required by subsection (b) of this section.

15 U.S.C. § 1640. Civil liability.

(a) Individual or class action for damages; amount of award; factors determining amount of award.

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and

the total recovery in such action shall not be more than the lesser of $100,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(b) Correction of error within fifteen days.

A creditor has no liability under this section for any failure to comply with any requirement imposed under this part if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed.

(c) Unintentional violations; bona fide errors.

A creditor may not be held liable in any action brought under this section for a violation of this subchapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Liability of subsequent assignees of original creditor.

Any action which may be brought under this section against the original creditor in any credit transaction in-

volving a security interest in real property may be maintained against any subsequent assignee of the original creditor where the assignee, its subsidiaries, or affiliates were in a continuing business relationship with the original creditor either at the time the credit was extended or at the time of the assignment, unless the assignment was involuntary, or the assignee shows by a preponderance of evidence that it did not have reasonable grounds to believe that the original creditor was engaged in violations of this part, and that it maintained procedures reasonably adapted to apprise it of the existence of any such violations.

(e) Jurisdiction of courts.

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

(f) Good faith compliance with rule, regulation, or interpretation of Board.

No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded or determined by judicial or other authority to be invalid for any reason.

(g) Recovery for multiple failures to disclose.

The multiple failure to disclose to any person any information required under this part to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries.

(h) Offset from amount owed to creditor.

A person may not take any action to offset any amount for which a creditor is potentially liable to such person under subsection (a)(2) of this section against any amount owing to such creditor by such person, unless the amount of the creditor's liability to such person has been determined by judgment of a court of competent jurisdiction in an action to which such person was a party.